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# Supreme Court of the United States.

OCTOBER TERM, 1904.

THOMAS L. HANTIGAN, Appellant,
vs.
THE UNITED STATES.
No. 72.

APPEAL FROM THE COURT OF CLAIMS.

## APPELLANT'S BRIEF.

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### *APPELLANT'S BRIEF.*

This case was filed in the Court of Claims on the 22d day of July, 1889. The petition is on pages 1 to 6 of the Record.

Appellant was appointed a cadet in the military academy July 1, 1880, having on the day previous taken the oath of office, which is copied in Finding 1, Rec. 7. Having passed his first semi-annual examination, he received a certificate of appointment February 10, 1881, and two days later he entered into contract with the United States, both as set forth in Finding II; Rec. 7, 8.

Appellant served as a cadet from July 1, 1880 to July 27, 1883, when he was summarily dismissed by order of the President upon the charge of maltreating

a new cadet on guard, personating an officer of the guard, making an improper use of the countersign, and disobedience of orders. Finding III; Rec. 8.

On the dismissal of appellant, another cadet was appointed to succeed him, and that cadet was graduated from the academy and appointed to be second lieutenant in the army of the United States in 1889, which nomination was confirmed by the Senate and he was duly commissioned by the President, January 7, 1890, and is now an officer in the army. Finding IV; Rec. 8.

Appellant, July 30, 1883, addressed a statement and petition to the Adjutant General requesting reinstatement or trial by court-martial, and on the 3rd day of August, 1883, he addressed a petition to the Secretary of War requesting reinstatement; subsequently, he caused a petition to be presented to the President asking for a revocation of the order of dismissal, the issuing of an order for his trial before a court-martial, and an order assigning and appointing him in the army as of the date of the assignment of the lowest graduate of his class.

These papers all asserted his innocence of the charges made against him. All these petitions and requests were denied.

The salary of a cadet at the time appellant was dismissed was $540 a year, and he sues for that salary during the period of six years. Finding VII; Rec. 9.

The court below ordered that the petition should be dismissed and the appeal is from that judgement. Rec. 12.

## *ARGUMENT.*

We submit that the questions to be considered in this case are:

1. Was the appellant an officer of the United States in the Constitutional sense of the word?

2. Did the President have the power to dismiss the appellant from the military academy without a trial by court-martial?

3. Does the action lie as it is brought?

### *I.*

Was the appellant an officer in the constitutional sense?

1. In sec. 2, art. 2, of the Constitution, it is provided that:

"Congress may by law vest appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments."

The President is given the power by sec. 1315, Rev. Stat., to appoint cadets in the military academy, and it was pursuant to that authority that appellant was appointed and the certificate of appointment issued to him by the Secretary of War.

It is evident that it was the legislative purpose to treat membership in the corps of cadets at the military academy as one of the "inferior officers" whose appointment was vested in the President by the provision of the Constitution we have quoted.

It is also evident that it was the legislative purpose that such cadets should have official status, for they

had to take and subscribe an oath to support the Constitution and obey the legal orders of superior officers, Sec. 1320. If a cadet were not an inferior officer there would be no occasion to use the words "my superior officers" and "office" found in the oath. Each cadet was required to sign articles, such as the paper copied in Finding II, Rec. 7, in which he agreed to serve in the army of the United States for eight years unless sooner discharged by competent authority. Those articles also contained an oath of office in the language of the oath prescribed by sec. 1320.

It is provided, also, that "cadets shall be subject at all times to do duty in such places and on such service as the President may direct." Sec. 1323. They are subject to trial by general courts-martial to be convened by the superintendent, subject to the same limitations and conditions existing as to other general courts-martial. Sec. 1326. They receive an annual salary. Sec. 1339.

It is held in *United States* vs. *Morton*, 112 U. S., 1, 3–7, that the corps of cadets is a part of the army, and that service as a cadet is actual service in the army of the United States. Statutes from the foundation of the military academy are reviewed in the opinion written by Mr. Justice Blatchford.

All the elements necessary to make a constitutional officer are found in the laws and decisions relating to these cadets, and it follows that their *status* is that of "officers" in the constitutional sense of the word. "An office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emoluments, and duties." *United States* vs. *Hartwell*, 6 Wall., 385, 393. The statutes relating to military cadets

embrace the ideas of tenure, duration, emoluments, and duties, as a reading of them will show, and they require cadets to take oaths and sign contracts which speak of their *status* as "officers." These statutes, oaths, and contracts put it out of the power of the United States to deny in a court of justice that cadets are officers.

2. We find parallels in the law relating to cadets or midshipmen in the naval academy. Rev. Stat., sec. 1511–1528. They are appointed by the Secretary of the Navy, sec. 1514, and they must agree to such regulations as the Secretary may prescribe. Sec. 1515. A course of fixed duration is prescribed. Sec. 1520, 1524. When they have passed the examination at the academy they receive appointments as midshipmen or cadet engineers. Sec. 1521, 1523. They are paid an annual salary.

The legislation relating to naval cadets is meager as compared with that relating to military cadets. No provision is made for oaths or courts-martial. In several other respects the statutes relating to naval cadets are very inadequate as compared with the statutes governing cadets in the military academy, yet the courts all hold that naval cadets are constitutional officers in the navy. *United States* vs. *Baker* 125 U. S. 646, where the subject was carefully considered.

In *Fitzpatrick* vs. *United States*, 37 C. Cls., 332, while claimant was a naval cadet, and on leave of absence at his home in New Orleans, he was ordered to League Island for duty, and when his services were no longer needed there he was ordered back to New Orleans. The accounting officers refused to allow him mileage for the journey from New Orleans to Phila-

delphia, but they allowed him constructive mileage from Annapolis to Philadelphia. The court held that the claimant was a naval officer within the statutes of the United States allowing naval officers traveling expenses when under orders. A cadet at the naval academy, and while he is pursuing his education there, is serving as such officer. The court was considering the act of March 3, 1883, 22 Stat., 473, which provides that "All officers of the navy shall be credited with the actual time they may have served as officers or enlisted men in the regular or volunteer army or navy, or both," * * *.

It was held that the claimant was within the language and purview of the act. The statutes and decisions were reviewed at length. The court planted itself on sec. 2, art. 2 of the Constitution, and held that Congress had vested the appointment of such cadets in the Secretary, and that when thus appointed they became officers in the navy, citing *Perkins* vs. *United States*, 20 C. Cls., 438, and other cases.

In the *Perkins case*, the claimant was a cadet engineer, and while undergoing instruction he was honorably discharged by the Secretary, against claimant's will, he not having been found deficient in examination, nor dismissed for misconduct under the provisions of sec. 1525, or upon and in pursuance of a sentence of a court-martial. The Court of Claims, held that he was a Constitutional officer in the navy, and that the Secretary had no power to discharge him. Therefore, he was still an officer in the navy and entitled to his pay. The case came to this court, where it is reported in 116 U. S., 483. and the views of the court below were adopted and its judgment affirmed.

In *Jasper's case*, 38 C. Cls. 202, it was held that a cadet midshipman, is an officer in the navy while

pursuing his studies at the naval academy. Why is not a cadet at the military academy an officer in the army while he is pursuing his studies there?

As was said of a passed assistant engineer in the navy, in *United States* vs. *Hartwell*, 95 U. S. 760, 763, so it may be said of the appellant: "The place has every ingredient of an office and we have seen the appellee appointed to it. * * * A thing may be within the letter of a statute and not within its meaning; and it may be within the meaning though not within the letter."

The ruling there was that the claimant was an officer in the navy, legally appointed.

In *United States* vs. *Cook*, 128, U. S., 254, appealed from the Court of Claims, claimant was a cadet at the naval academy where he graduated in 1879. He claimed additional pay under the act which declared that "All officers of the navy shall be credited with the actual time they may have served as officers or enlisted men in the regular or volunteer army or navy, or both," * * * The Government claimed that he did not serve either as an officer or enlisted man while a student at the academy and therefore was not an officer within the sense of the act. After quoting from the case of *United States* vs. *Baker*, 125 U. S., 646, and adhering to the views there expressed, Mr. Justice Bradley said: "That a midshipman is an officer has been understood ever since there was a navy. He is not one of the common seamen. His name indicates a middle position, between that of a superior officer and that of a common seaman." P. 256.

So, in the case at bar, we may justly say that a cadet at the military academy is an officer has been understood ever since we had an army. He is not an

enlisted man. The statutes and his name indicate that he occupies a position between the common soldier and the superior officer.

Thus we bring the appellant clearly within the constitutional and statutory provisions relating to the appointment and the government, as well as the rights, duties, powers and privileges, of officers in the army of the United States including military cadets. *If not within their letter, he is clearly within their meaning.*

We submit that it is far more important to the individual, the public and the army, that the officer shall be made secure of his place or office in the army than that he shall be secure of his pay, emoluments or money privileges. The cases that have been cited show that the courts have not been reluctant in declaring what the rights of such officers are in mere money matters, but we submit that there is a question here involved of far greater moment than any question can be which involves only an amount of money. If the President has not been clothed with the power of dismissing a cadet in the way this appellant was dismissed from the army, the existence of such power should be denied in plain and unequivocal language by the courts.

II.

Has the President the legal authority to dismiss a cadet in the military academy in time of peace, except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof?

1. *We answer the question in the negative.*

The concluding sentence of sec. 1229, Rev. Stat., is in these words :

"That no officer in the military or naval service shall in time of peace be dismissed from service, except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof."

This section is a part of Chapter I, Title XIV—The Army. There are five more chapters in that title, all relating to the army, viz: Chapter II, Retirement; Chapter III, Pay and Allowances; Chapter IV, The Military Academy; Chapter V, Articles of War; Chapter VI, Military Prison.

These chapters comprise the body of the law establishing and governing our regular army in all its parts, and sec. 1229 is a part and parcel of that body of laws.

The language we have quoted was taken by the compilers of the Rev. Stat. from section 5 of the act of July 13, 1866, 14 Stat., 92, which act made appropriations for the support of the army for that fiscal year, and it was put in that act at the time when the Congress was engaged in restricting the powers of the President, and in denying the existence of powers which he was then asserting. *Blake* vs. *United States* 103 U. S. 227, 230, 234, 237, opinion by Mr. Justice Harlan, stating the facts in detail.

Up to the time of the enactment of sec. 1229 it had been held that the President had the power to remove army officers, not cadets in the military academy alone, or inferior officers alone, but army officers of whatever rank. It was asserted that this power of removal was in the President, was discretionary in character, and that his action could not be reviewed. *Gratiot's case*, 1 C. Cls. 258; 2 Story on the Constitution, sec. 1537.

These authorities show the nature of the evil which Congress sought to remedy by the enactment of sec. 1229. Congress determined and enacted that the President should no longer exercise the power of discretionary or arbitrary removal of an officer of the army or navy. This statute limited the power of the President to dismiss such officers; it denied his jurisdiction in such cases, and made him an executive officer only. In *McBlair's case*, 19 C. Cls. 528, 541, the court, speaking through Judge Weldon, said:

"While the President is made commander-in-chief by the Constitution, Congress have the right to legislate for the army, not impairing his efficiency as such commander-in-chief, and when a law is passed for the regulation of the army, having that constitutional qualification, *he becomes as to that law an executive officer, and is limited in the discharge of his duty by the statute.*"

This statute is of comparatively recent origin. It is broad and comprehensive in its scope. It applies to both the army and navy, and it prohibits the dismissal of any officer unless he shall have been convicted on a trial before a court-martial. It is a denial of authority and a grant of protection. So far as it relates to the President, it is a negative statute.

In Sutherland on Statutory Construction, sec. 203, the learned author treats of such statutes as follows:

"Sec. 203. A *negative* statute is one expressed in negative terms. And here the rule prevails that if a subsequent statute, contrary to a former, has negative words, it shall be a repeal of the former; and a negative statute, it is said too, so binds the common law that a man cannot afterwards have recourse to the latter. Of this form and nature is this provision generally found in the statute of limitations: 'No acknowledgment or promise is sufficient evidence of a

new or continuing contract, by which to take the case out of the operation of this statute, unless the same is contained in some writing signed by the party to be charged thereby.' Negative words make a statute imperative."

Tested by the above rules it becomes plain that sec. 1229, is negative and imperative, operating to repeal all previous statutes within the scope and purview of its language, and throwing its protecting arms about this appellant. There was no court-martial; there was no lawful dismissal in this case.

The interpretation of sec. 1229 was the question considered by this court in *Blake* vs. *United States*, 103 U. S., 227, 235, and it was held, Mr. Justice Harlan speaking for the court, that it meant the President should not "thereafter, in time of peace, exercise such power of dismissal, except in pursuance of a court-martial sentence to that effect, or in commutation thereof."

This is exactly the interpretation for which we are contending here.

(2.) *The law provided a military tribunal by which appellant could have been tried.*

It is enacted in sec. 1326 that "The superintendent of the military academy shall have power to convene general courts-martial for the trial of cadets and to execute the sentence of such courts, except the sentence of suspension and dismission, subject to the same limitations and conditions now existing as to other general courts-martial."

The superintendent was given power by this statute to convene general courts-martial for the trial of cadets and to execute the sentences of such courts, except the sentence of suspension and dismission.

Such sentences could only be executed by the President. Sec. 1229, Rev. Stat.; Arts. of War, 71–114.

Sec. 1326 was passed March 3, 1873, (17 Stat. 604) long after sec. 1342 and its Articles of War, and seven years after the enactment of sec. 1229.

It is not for the courts to presume that Congress did an idle or foolish thing or that there was no sufficient purpose in this new legislation. It was evidently the determination of Congress that this subject was and should remain out of the realm of, and free from the restrictions and limitations of, sec. 1342, and its appended Articles of War, on a footing of its own as a distinct and separate statute. Had Congress desired to put this subject under the control of the narrow provisions of sec. 1342 and the Articles of War, it would have been enough to amend the beginning of that section or Art. 99, and the fact that such amendment was not made is clearly indicative of the legislative purpose that the subject was worthy of and should receive treatment in a separate enactment.

One does not have to go far to find the reason. Section 1342 and its Articles of War do not cover cadets. That section begins with the declaration that "the word 'officer' * * * shall be understood to designate commissioned officers;" * * * Cadets in the military academy are not commissioned officers; therefore, they could not be court-martialed as such. Congress did not intend that cadets should be classed as "non-commissioned officers, musicians, artificers, and privates, and other enlisted men," and so sec. 1326 became a law March 3, 1873. That section established a military court for the correction of cadets, and gave them the protection of sec. 1229, thus putting it out of the power of the President to

remove them without the sentence of a court-martial.

If it should be urged that the court-martial spoken of in sec. 1229 is a court-martial to be held under the Articles of War, we would say that it may be the case so far as officers, generally speaking, are concerned, but the court-martial spoken of in that section may just as well be, and of necessity must be in the case of a cadet, the one authorized by sec. 1326. The language applies to future, as well as to existing courts-martial, or laws creating them.

If the court-martial authorized by the latter section is covered by the language of sec. 1229, as we think it is, then it is perfectly clear that this case is to be considered without any regard to sec. 1342 and its Articles of War. That section and those articles being removed from the case, it follows inevitably that the judgment of the court below was radically wrong.

Section 1326 was enacted and must stand alone so far as furnishing a tribunal for the trial of cadets is concerned. If other statutes on the subject had existed, they were repealed or modified by that act, for it was plainly intended to cover the whole subject, and to prescribe the only rules which are to govern in respect to that subject. This is a well settled rule. *Tracy* vs. *Tuffly*, 134 U. S., 206, 223, and cases cited.

3. *Cadets are not "candidates merely."*

The court below held that cadets may be "described as candidates merely for commissioned officers." If we have shown that they are officers in the constitutional sense, and we think we have done so, it does not matter what descriptive words may be added.

True it is that a cadet on graduating would be appointed to a superior office and given a commission; so would a cadet in the naval academy, but the courts have all held such cadets to be officers, *not "candidates merely."*

If the view of the court below on this point be sound, it follows that all the cases we have cited which hold naval cadets to be officers should be overruled.

## III.

Does the action for pay lie as brought?

We submit that it does, just as it did in *United States* vs. *Perkins*, 116 U. S. 483, where a naval officer was wrongfully dismissed, and was allowed to recover his pay. That is what appellant seeks to do in this case.

We conclude that the appellant was under the protection of sections 1229 and 1326, and that the President had no power to dismiss him, in the absence of the sentence of a court-martial to that effect.

As he was wrongfully and unlawfully dismissed, he is entitled to recover the pay which would have been his had he remained in the service during the period covered by the petition, and which the court below found to be $3,096, after deducting $144 for the benefit of the equipment fund. Finding VII; Rec. 9. Petition claims $3,417,00, Rec. 5.

For these reasons we respectfully submit that the judgment of the court below should be reversed.

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